



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 225

Docket DARS-2018-D007

RIN 0750-AJ38

Defense Federal Acquisition Regulation Supplement: Safe Access to Projects in Afghanistan (DFARS Case 2017-D032)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that prohibits use of funds for certain programs and projects of the Department of Defense in Afghanistan that cannot be safely accessed by United States Government personnel.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending the DFARS to implement section 1216 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). Section 1216 requires that funding amounts available to the Department of Defense may not be obligated or expended for a construction or other infrastructure program or project of the Department in Afghanistan if military or civilian personnel of the United States Government, or their representatives with authority to conduct oversight of such program or project, cannot safely access such program or project. The prohibition may be waived with an approved determination.

II. Discussion and Analysis

To implement section 1216, this rule adds a new DFARS section 225.7705, Prohibition on use of funds for contracts of certain programs and projects in Afghanistan that cannot be safely accessed. The procedures provided in this new section are strictly internal to the Government, in that they instruct the contracting officer to not obligate funds on the covered contracts, unless (1) Government personnel can safely access the project, or (2) a determination is approved by the appropriate authority to waive this restriction, as outlined in the statute.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new burdens or impact applicability of clauses and provisions at or below the simplified acquisition threshold, or to acquisition of commercial items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because the rule relates to agency organization, management, or personnel.

VI. Publication of this Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation is codified at Title 41 of the United

States Code (formerly known as the Office of Federal Procurement Policy Act). Specifically, 41 U.S.C 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it only provides procedures for United States Government personnel to follow for certain programs and projects in Afghanistan that cannot be safely accessed. These requirements affect only the internal operating procedures of the Government.

VII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section VI. of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 225

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 225 is amended as follows:

PART 225—FOREIGN ACQUISITION

1. The authority citation for part 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Amend section 225.7700 by adding paragraph (e) to read as follows:

225.7700 Scope.

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(e) Section 216 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328).

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3. Add sections 225.7705, 225.7705-1, 225.7705-2, and 225.7705-3 to subpart 225.77 to read as follows:

225.7705 Prohibition on use of funds for contracts of certain programs and projects in Afghanistan that cannot be safely accessed.

This section implements section 1216 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328).

225.7705-1 Prohibition.

The contracting officer shall not obligate or expend funds for a construction or other infrastructure program or project of the Department in Afghanistan if military or civilian personnel of the United States Government or their representatives, with authority to conduct oversight of such program or project, cannot safely access such program or project. In limited circumstances, this prohibition may be waived in accordance with section 225.7705-2.

225.7705-2 Waiver of prohibition.

(a) The prohibition in 225.7705-1 may be waived upon issuance of a determination, approved in accordance with paragraph (b) of this section, that—

(1) The program or project clearly contributes to United States national interests or strategic objectives;

(2) The Government of Afghanistan has requested or expressed a need for the program or project;

(3) The program or project has been coordinated with the Government of Afghanistan, and with any other implementing agencies or international donors;

(4) Security conditions permit effective implementation and oversight of the program or project;

(5) Safeguards to detect, deter, and mitigate corruption and waste, fraud, and abuse of funds are in place;

(6) Adequate arrangements have been made for the sustainment of the program or project following its completion, including arrangements with respect to funding and technical capacity for sustainment; and

(7) Meaningful metrics have been established to measure the progress and effectiveness of the program or project in meeting its objectives.

(b) The following officials are authorized to approve the determination described in paragraph (a) of this section:

(1) In the case of a program or project with an estimated lifecycle cost of less than \$1 million, by the contracting officer.

(2) In the case of a program or project with an estimated lifecycle cost of \$1 million or more, but less than \$20 million, by the senior U.S. officer in the Combined Security Transition Command-Afghanistan.

(3) In the case of a program or project with an estimated lifecycle cost of \$20 million or more, but less than \$40 million, by the Commander of United States Forces-Afghanistan.

(4) In the case of a program or project with an estimated lifecycle cost of \$40 million or more, by the Secretary of Defense.

(c) Congressional notification is required within 15 days of issuance of a determination to waive the prohibition for programs or projects valued at \$40 million or more in accordance with paragraph (b)(4) of this section.

225.7705-3 Procedures.

(a) The contracting officer shall not obligate or expend funds for contracts for a construction or other infrastructure program or project in Afghanistan, awarded after December 23, 2016, unless the requiring activity provides the following documentation:

(1) Written affirmation that military or civilian personnel of the United States Government or their representatives, with authority to conduct oversight of such program or project, can safely access such program or project; or

(2)(i) For programs or projects valued at less than \$1 million, sufficient information upon which to base the determination described in 225.7705-2(a); or

(ii) (A) For programs or projects valued at \$1 million or more, a copy of the approved determination described in 225.7705-2(a) and (b); and

(B) For programs or projects valued at \$40 million or more, a copy of the Congressional notification described in 225.7705-2(c).

(b) After contract award, the contracting officer shall review the requiring activity's progress reports (e.g., contracting officer's representative reports) that addresses whether access continues to be safe or security conditions continue to permit effective implementation and oversight of the contract. If the requiring activity does not affirm continued safe access or, if a determination to waive the prohibition has been approved, that security conditions continue to permit effective implementation and oversight of the contract, then the contracting officer shall consult with the requiring activity to take any appropriate actions.

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